21. By establishing AT&T as a near monopolist in the distribution of broadband services today, the proposed transaction increases AT&T's ability to impose significant costs on unaffiliated providers of broadband services. Suppliers that do not establish preferential relationships with AT&T may face significant difficulties in distributing their services. In the absence of alternative channels of broadband distribution, disfavored providers of broadband services may be driven from the market or may fail to achieve the scale required to provide services efficiently. The risk that suppliers of broadband content may be foreclosed from efficient distribution of their services may deter investment in these services.

22. For example, AT&T's entry into an preferential arrangement with a provider of streaming video service may place providers of rival video services at a significant competitive disadvantage. As a result, these rivals may be forced to operate at an inefficient scale or may be driven from the market. These circumstances can result in the creation of a streaming video supplier with the ability to exercise market power.

23. I understand that discrimination against the unaffiliated providers of broadband services may not be avoided when consumers attempt to circumvent, or "click through," AT&T's preferred supplier to access an alternative provider. To the contrary, I understand that AT&T can grant its preferred content providers technological advantages that cannot be duplicated by others. For example, I understand that AT&T may be able to provide its affiliated content provider unique advantages by providing them the exclusive ability to "cache" data at the server located nearest the consumer. At the same time, AT&T would be able to degrade the quality of competing services provided by rivals.[19]

24. In this way, the transaction enables AT&T to use its position as a near-monopolist in the provision of broadband access to harm competition in adjacent markets, resulting in harm to consumers of such services. Even if other forms of broadband access eventually provide

19. I understand, for example, that AT&T has the ability to limit providers of streaming video suppliers to film clips no longer than ten minutes in lengths. Presumably, a variety of such mechanism could be used to disadvantage broadband services provided by rivals to AT&T's preferred suppliers.

alternatives to @Home and Road Runner, harm to competition in the provision of broadband content today could have long-lasting effects as the broadband content providers that face discrimination by AT&T will fail to emerge as viable competitors.

25. Moreover, AT&T's strategy can adversely affect the development of DSL and other broadband Internet access services that compete with AT&T. For example, AT&T could engage in a strategy which required upstream providers to distribute their broadband content exclusively through AT&T affiliated systems. This could raise significantly the costs faced by rival providers of broadband access services in establishing a package of broadband services that would be attractive to subscribers. Even if AT&T entered into non-exclusive agreements with firms providing broadband content, it still could require its preferred suppliers to make service upgrades available to AT&T customers before they are made available to subscribers on other systems. This, again, would raise the costs faced by rival providers of broadband access services.

26. Moreover, as the access provider for the vast majority of broadband customers, AT&T could have an incentive to develop proprietary software and network protocols that would prevent broadband Internet applications provided by AT&T preferred providers from being readily applied on DSL or other broadband access technologies. Establishment of such protocols also could lead developers of broadband content to develop and deploy software and content on AT&T network before developing similar applications for other broadband Internet access providers. These strategies would help preserve AT&T's current position as the leading provider of broadband Internet access and would raise the costs faced by providers of rival broadband access technologies, such as DSL, from offering access services that compete with AT&T's.

27. Any reduction in competition in the provision of broadband content resulting from AT&T establishing preferred supplier relationships or establishing proprietary software and network protocols would raise the costs faced by DSL (and other competing service), making them less effective competitors to AT&T. This increases AT&T's ability to maintain its current

position as a near monopolist in the provision of broadband Internet access services, to the detriment of consumers.

28. AT&T's strategy of establishing preferential relationships with suppliers of broadband content reveals that AT&T considers this "closed" system to be more profitable than operating under an "open access" structure. This structure benefits AT&T by allowing it to extract a portion of the upstream profits created by establishing preferential relationships with providers of broadband content and imposing costs on their rivals, perhaps by setting (implicit or explicit) fees charged to content providers for distribution of broadband content.[20]

29. I am aware of no efficiency rationale for AT&T's decision to deploy a "closed" system and to establish preferential relationships with content providers. I understand, for example, that there are no technological impediments to offering broadband Internet access on over cable systems on an "open" basis.[21] In the absence of such efficiency considerations, the proposed transaction increases the risk of significant harm to consumers without generating offsetting benefits. AT&T instead has argued simply that the closed system would generate higher profits than an open one that these profits are necessary to justify its investment. Again, I am not aware of any evidence that AT&T has presented to support these claims.

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20. If broadband Internet "access" and "content" were consumed in fixed proportions, and in the absence of external effects, then AT&T could fully extract the value of its market power through the access fees charged to subscribers. The profits that AT&T could earn under such circumstances could not be increased through vertical integration and/or establishment of preferential relationships with content suppliers. It is highly unlikely, however, that broadband access and content are consumed in fixed proportions. Subscribers inevitably will vary with respect to the intensity of demand for various broadband services and it is unlikely that AT&T could identify the intensity of individual subscribers demands and varying the access prices they charged in response. In addition, by creating market power in upstream services, AT&T may be able to capture a portion of the resulting profits earned by content providers on sales to customers that obtain Internet access from firms other than AT&T.

21. I understand that GTE has demonstrated the viability of open access cable based broadband Internet services in a trial in Clearwater, Florida. See accompanying Declaration of Albert Parisian.

V. THE RISK TO COMPETITION COULD BE OBVIATED BY REQUIRING AT&T TO PROVIDE OPEN ACCESS TO UNAFFILIATED ISPS

30. The proposed transaction creates the risk of harm to competition by establishing AT&T as access provider to the vast majority of broadband Internet subscribers. This position increases AT&T's incentive and ability to engage in a strategy of discriminating against unaffiliated providers of broadband Internet content and prevents them from gaining efficient distribution of their services. In turn, the foreclosure risks created by the transaction could result in harm to competition in the provision of (i) broadband Internet content; and (ii) broadband Internet access services.

31. These risks can be obviated by requiring AT&T to provide access to unaffiliated ISPs on a non-discriminatory basis.[22] With ISPs able to compete to provide services to @Home's and Road Runner's subscribers, the success of various broadband services will be determined by consumer preferences, not choices made by AT&T regarding the firms with which it chooses to establish a preferred relationship. While individual ISPs, including @Home and Road Runner, would still be able to establish preferred relationships with suppliers of broadband Internet content, firms that fail to gain a preferred relationship with @Home and Road Runner nonetheless could readily establish similar relationships with other ISPs, and would not be put at a competitive disadvantage as the result of AT&T's strategy. Similarly, requiring AT&T to provide open access to unaffiliated ISPs would reduce the risk that rival broadband access services, such as DSL, would be harmed by the failure of competition to develop in the provision of broadband content services.

32. As mentioned above, I am unaware of any efficiency rationale for AT&T's decision to tie the provision of transport and ISP services. I understand that open access cable-based Internet broadband services have been demonstrated by GTE and that Canada has

22. I understand that such a requirement would enable ISPs to access only the cable provider's transport facilities.

mandated such systems.[23] Moreover, an open access requirement would leave unaltered AT&T's ability to charge an unregulated price for broadband Internet transport.

VI. CONCLUSION

33. The proposed merger of AT&T and MediaOne creates the risk of harm to competition in the provision of (i) broadband Internet content and (ii) broadband Internet access services. This is the consequence of two factors: (i) the merged company's large role in the provision of broadband Internet access services today; and (ii) AT&T's strategy of not offering its broadband Internet services on an "open access" basis. Instead, AT&T has chosen to tie the provision of last-mile broadband Internet transport and the provision of ISP services, one aspect of a broader policy of establishing preferential relationships with suppliers of broadband content.

34. The proposed transaction risks harm to competition by increasing the dependence of broadband content providers on AT&T and thus increasing AT&T's incentive and ability to impose costs on unaffiliated providers of broadband services. Suppliers of broadband content that fail to establish preferential relationships with AT&T may be driven from the market or may be forced to operate at an inefficiently small scale. Similarly, the transaction increases AT&T's incentive to establish proprietary software and network protocols that give content suppliers incentives to first offer new services or upgrades of existing services to AT&T.

35. Such actions would be expected to profit AT&T, which may be able to extract a portion of the rents earned by favored upstream suppliers. In addition, AT&T's strategy is likely to benefit AT&T by limiting the availability of broadband content that can readily by distributed over DSL. Because broadband Internet services are likely to compete with traditional television programming, AT&T's actions have the further effect of helping to protect AT&T's market power as a local monopolist in the provision of cable television services.

23. Canadian Radio-Television and Telecommunications Commission, Telecom Decision RTC 99-8, Regulation Under the Telecommunications Act of Cable Carriers' Access Services, File No.: 8697-C12-02/98.

36. These risks of harm to competition can be obviated by requiring @Home and Road Runner to provide access to unaffiliated ISPs on a non-discriminatory basis. An "open access" structure greatly reduces AT&T's incentive and ability to impose costs on unaffiliated suppliers of broadband services and leaves the determination of the marketplace success of these services in the hands of consumers, not AT&T. AT&T has presented no evidence that its "closed" model is required in order to justify its investment in broadband Internet access services. In the absence of any efficiency rationale for AT&T's strategy, an "open access" requirement is likely to benefit consumers.

37. AT&T's suggestion that market power concerns are irrelevant due to competition from narrowband providers misses the point. There are a wide variety of broadband-specific services that narrowband providers cannot provide. Narrowband suppliers cannot constrain AT&T's market power in the distribution of broadband services, and the magnitude of AT&T's investment indicates the commercial importance of broadband services is likely to be very large. Potential competition to AT&T from alternative broadband access technologies also is of limited relevance if AT&T's actions are successful in interfering with their emergence in the marketplace.

I declare under penalty of perjury that the foregoing is true and correct.

Robert H. Gertner

August 19, 1999

Robert H. Gertner
Principal and Vice President

Business Address: Lexecon Inc.
332 S. Michigan Avenue
Chicago, Illinois 60604
(312) 322-0200

Graduate School of Business
The University of Chicago
1101 East 58th Street
Chicago, Illinois 60637
(773) 702-7203
Fax: (773) 702-2044
E-mail:rob.gertner@gsb.uchicago.edu

Home Address: 5557 South Kenwood Avenue
Chicago, Illinois 60637
(773) 363-9079

EDUCATION

Massachusetts Institute of Technology, Ph.D., September, 1986. Thesis Title: "Essays in Theoretical Industrial Organization."

Princeton University, A.B., summa cum laude, June, 1981, major in Economics.

EMPLOYMENT

Professor of Economics and Strategy, Graduate School of Business, The University of Chicago, September 1995 - present.

Research Fellow, National Bureau of Economic Research, October 1994 - present.

Associate Professor of Economics and Strategy, Graduate School of Business, The University of Chicago, April 1995 - August 1995.

Associate Professor of Business Economics, Graduate School of Business, The University of Chicago, September 1990 - April 1995.

Visiting Associate Professor of Management and Strategy, J. L. Kellogg Graduate School of Management, Northwestern University, September 1994 - March 1995.

Assistant Professor of Business Economics, Graduate School of Business, The University of Chicago, September 1986 - August 1990.

Full-time Consultant, American Telephone and Telegraph Company, Microeconomic Analysis Group, September 1981 - July 1982.

OTHER POSITIONS

Editor, *Journal of Business*, July 1995 - present.

Associate Editor, *Journal of Industrial Economics*, August 1995 - present.

FELLOWSHIPS AND GRANTS

John M. Olin Visiting Fellow in Law and Economics, The Law School, University of Chicago, 1990 - 1991.

IBM Corporation Scholar, University of Chicago, Graduate School of Business 1989 - 1990.

National Science Foundation Research Grant, "Bankruptcy and the Costs of Financial Distress," 1989 - 1991.

Visiting Scholar, CEPREMAP, Paris, France, April 1988.

Alfred P. Sloan Foundation Doctoral Dissertation Fellowship, 1985 - 1986.

National Science Foundation Graduate Fellowship, 1982 - 1985.

ACADEMIC PUBLICATIONS

BOOK:

Game Theory and the Law, (with Douglas Baird and Randal Picker), Harvard University Press, November 1994.

PUBLISHED AND FORTHCOMING PAPERS

"Agreement Under Section 1 of the Sherman Act," (with Andrew Rosenfield), November, 1997 (*forthcoming The New Palgrave Dictionary of Economics and the Law*).

"Unravelling and Disclosure Laws," August 1997 (*forthcoming The New Palgrave Dictionary of Economics and the Law*).

"Communication Among Competitors: Game Theory and Antitrust," (with Dennis Carlton and Andrew Rosenfield), Spring, 1997 *George Mason Law Review*, vol. 5.

"Multimarket Contact and Tacit Collusion with Imperfect Monitoring," (with Barbara

McCutcheon), December, 1992, revised, September, 1993, (under review, *Rand Journal of Economics*).

"Settlement Escrows," (with Geoffrey Miller), *Journal of Legal Studies*, 24 January, 1995. 87-122.

"Internal versus External Capital Markets," (with David S. Scharfstein and Jeremy C. Stein), *Quarterly Journal of Economics*, 109, November, 1994, 1211-1230.

"Anatomy of Financial Distress: An Examination of Junk-Bond Issuers," (with Paul Asquith and David Scharfstein), *Quarterly Journal of Economics*, 109, August 1994, 625-658.

"Asymmetric Information, Uncertainty, and Selection Bias In Litigation," 1993, *The University of Chicago Law School Roundtable*, Vol. 1993 (inaugural edition), 75-94.

"Game Shows and Economic Behavior: Risk Taking on '*Card Sharks*'," *Quarterly Journal of Economics*, 108, May, 1993, 507-521.

"Search With Learning from Prices: Does Increased Inflationary Uncertainty Lead to Higher Markups?" (with Roland Benabou), *Review of Economic Studies*, 60, January, 1993, 69-94.

"Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules," (with Ian Ayres), 101, *Yale Law Journal*, January, 1992, 729-773.

"A Theory of Workouts and the Effects of Reorganization Law," (with David Scharfstein, *Journal of Finance*, 46, September, 1991, 1189-1221.

"Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," (with Ian Ayres), *Yale Law Journal*, 99, November, 1989, 87-130. Excerpts appear in, Richard Craswell and Alan Schwartz, editors, *Foundations of Contract Law*, Oxford University Press, 1994.

"Market Power and Mergers in Durable Goods Industries," (with Dennis Carlton), *Journal of Law and Economics*, 32, October 1989, S203-S226.

"Simultaneous Signaling to the Capital and Product Markets," (with Robert Gibbons and David Scharfstein, *Rand Journal of Economics*, 19, Summer 1988, 173-190.

WORKING PAPERS

"Tacit Collusion with Immediate Responses: The Role of Asymmetries," April, 1993, revised, December, 1994 (under review, *Journal of Political Economy*).

"Internal Capital Markets: The Enforcement and Efficiency of Exclusive Capital Supply Contracts," December, 1994, formerly, "The Organization of Capital Market Transactions: Exclusive Contracts and Vertical Integration Under Asymmetric Information," June, 1986.

"Externalities, Delay, and Coalition Formation in Multilateral Bargaining," August, 1994, originally titled, "Inefficiency in Three-Person Bargaining," June 1989.

"Bankruptcy, Information Transmission and the Allocation of Control," (with Randal Picker). February, 1992, revised, April, 1994.

"Capital Structure Signalling in Distressed Debt Workouts," November 1990, revised, September, 1993.

"Internal Capital Markets," March, 1995.

"Revenue and Efficiency Differences Between Sequential and Simultaneous Auctions with Limited Information," October, 1995.

"Coordination, Dispute Resolution, and the Scope of the Firm," April, 1996.

"Price Fixing Under the Sherman Act: The New Learning from Game Theory," with Andrew Rosenfield), May, 1996.

"The Value-Maximizing Board," (with Steven Kaplan), December, 1996.

CASE STUDIES

"The Feature Animation Industry in 1995: Challenging Disney's Supremacy," (with Stacey Roth), March, 1995, revised, September, 1995.

"Selling the Radio Spectrum: The 30 MHz MTA PCS Auction," April 1995.

TEACHING EXPERIENCE

Microeconomics (M.B.A.)

Applied Microeconomics (M.B.A./Ph.D.)

Industrial Organization (Ph.D.)

Financial Markets and Institutions (M.B.A.)

Competitive Strategy (M.B.A.)

Corporation Law (J.D.)

Business Policy (M.B.A.)

Management of Organizations (M.B.A. Kellogg)

Seminar on Advanced Antitrust (J.D.)

Advanced Competitive Strategy: Game Theory in Practice (M.B.A.)